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Supreme Court of the United States

OCTOBER TERM, 1945

No. 158.

THE PEOPLE OF THE STATE OF NEW YORK,
ex rel. DONALD A. J. RAY,
Petitioner-Appellant,

vs.

WALTER B. MARTIN, as Warden of Attica State Prison, Attica, New York,
Appellee.

BRIEF FOR THE WARDEN AND THE STATE OF NEW YORK.

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INDEX

	PAGE
Question	1
How it arises	2
Quaere, whether the question previously stated can be raised by habeas corpus	3
The State jurisdiction is not doubtful	5
Summary of argument	6–7
Point I. Indian Law § 71, insofar as it provides that "all the general laws of the state" extend over and apply to Salamanca, is not inconsistent with the Constitution of the United States, particularly Article I, Section 8, Clause 3, or with any treaty entered into or laws enacted thereunder	8
A. Historical Background	8
B. Argument of Specific Points	32
(1) There is no inconsistency between the State jurisdiction asserted and the seventh article of the Treaty of Canandaigua	32
(2) Indian Law § 71 is constitutional even without express authorization by Congress	32
(3) However, Indian Law § 71 is authorized by Congress in the 1875 Act	34
(4) The Forness decision does not hold to the contrary	34
(5) Salamanca is not "Indian country" and hence 25 U. S. C. § 217 does not render 18 U. S. C. §§ 451 and 452 applicable	36
Appendix: Digest of all decisions by the Supreme Court of the United States and the Circuit Court of Appeals, Second Circuit, relative to the New York Indians, to November 30, 1945	45

TABLE OF CASES.

	PAGE
Adams v. United States, 319 U. S. 312	37
Bates v. Clark, 95 U. S. 204	39, 40, 41, 42
Benson v. United States, 44 F. 178	4, 5, 39
Cherokee Tobacco, 11 Wall. 616	35
Clairmont v. United States, 225 U. S. 551	42
Davis v. Johnston, 144 F. 2d 862; cert. den. 323 U. S. 789, 819	4
Donnelly v. United States, 228 U. S. 243	38, 42
Draper v. United States, 164 U. S. 240	5, 42
Ex parte Crow Dog, 109 U. S. 556	38, 39, 42
Ex parte Ray, 54 F. Supp. 218	2
Goodell v. Jackson, 20 Johns. Rep. 694	15
Hanley v. Kansas City, 187 U. S. 617	33
Hatch v. Luckman, 64 Misc. 508	15
Holden v. Joy, 17 Wall. 211	35
James v. Dravo Contracting Co., 302 U. S. 134	37
Matter of Morhous v. N. Y. Sup. Ct., 293 N. Y. 131	4
New York ex rel. Cutler v. Dibble, 21 How. 366	17, 35
New York Indians, 5 Wall. 761	39
People ex rel. Carr v. Martin, 286 N. Y. 27	3
People ex rel. Cusick v. Daly; 212 N. Y. 183	4, 33, 38
People ex rel. Erie R. R. Co. v Beardsley, 41 N Y. 619.	24
People ex rel. Kennedy v. Becker, 241 U. S. 556	12
People ex rel. Ray v. Martin, 181 Misc. 925; aff'd 268 App. Div. 218; aff'd 294 N. Y. 61	3
Pickett v. United States, 216 U. S. 456	42
Rice v. Olson, 89 L. ed. 903	4
Surplus Trading Co. v. Cook, 281 U. S. 647	33, 37
The Scotia, 14 Wall. 170	35
United States v. Bailey, 1 McLean 234	4, 17, 33
United States v. Forness, 125 F. 2d 928; cert. den. 316 U. S. 694	2, 3, 34

PAGE

United States v. Holliday, 70 U. S. 407 33
United States v. Kagama, 118 U. S. 375 38
United States ex rel. Kennedy v. Tyler, 269 U. S. 13..23, 35
United States v. Le Bris, 121 U. S. 278..... 42
United States v. 43 Gallons, 93 U. S. 188 35
United States v. Rogers, 4 How. 567 33
United States v. McBratney, 104 U. S. 621 .....5, 42
United States v. McGowan, 302 U. S. 535 33
United States v. National Gypsum Co., 141 F. 2d 859 .. 19
United States ex rel. Ray v. Martin, 141 F. 2d 300..... 2, 3
Worcester v. Georgia, 6 Peters 515 .....9, 11, 16

TABLES OF STATUTES

Constitution of the United States, Art. I § 8 Cl. 3..... 1, 7
Constitution of State of New York, 1846, Art. I § 14.. 31
18 U. S. C. §§ 451, 452.....4, 36
18 U. S. C. § 548.....4, 38, 43
25 U. S. C. § 217.....4, 36, 37, 41, 43
25 U. S. C. § 241..... 39
Indian non-intercourse acts 11, 13, 37
18 Stat. 330 (1875 Act) 2, 30, 31, 34, 35, 37, 43
26 Stat. 558 31
N. Y. Indian Law § 71 (L. 1881 c. 188) 1, 6, 30, 32, 33, 43
N. Y. Penal Law §§ 1044, 1045-a..... 2
N. Y. Session Laws:
L. 1803 c. 31..... 14
L. 1813 c. 91..... 17
L. 1821 c. 204..... 18
L. 1822 c. 204..... 15
L. 1836 c. 316..... 24
L. 1845 c. 150..... 19
L. 1847 c. 365..... 19
L. 1847 c. 466..... 26
L. 1849 c. 378..... 20
L. 1860 c. 439, 481 19

PAGE

L. 1861 c. 283 19
L. 1866 c. 30, 263, 472 26
L. 1871 p. 2179 27
L. 1914 c. 508 21
L. 1915 c. 561 21

TABLE OF MISCELLANEOUS REFERENCES.

H. R. 227, 21st Cong. 1st Sess. 15
H. R. 474, 23rd Cong. 1st Sess. 40
H. R. 478, 43rd Cong. 1st Sess. 29
H. Misc. Doc. 75, 43rd Cong. 2d Sess. 29
S. Rep. 1680, 51st Cong. 1st Sess. 31
S. Docs. 145, 190, 55th Cong. 2d Sess. 31
H. Doc. 1590, 63rd Cong. 3rd Sess. 22
Hearings on H. R. 9720, 71st Cong. 2d Sess. 22
S. Doc. 87, 72d Cong. 1st Sess. 31, 35
Congressional Globe, 1872-1875 ..... 27, 29, 30
Bd. of Indian Comrs., annual report 1874, 1875 27
" " " 1924 33
Commissioner Ind. Af., " 1850 20
" " 1864 20
" " 1872 27
" " 1874 ..... 21, 28
" " 1889 21
" " 1892 ..... 21, 31
" " 1897 21
" " 1898 21
Treaty of Fort Stanwix 1784 8
" Fort Harmar 1789 13
" Canandaigua 1794 ..... 11, 13, 32
" Big Tree 1797 ..... 12, 13
" Buffalo Creek 1838 19
" " 1842 19
" Tonawanda 1857 19

PAGE

Indian Treaties (Washington, 1826, 1837) 9
National Archives, Indian Office letterbooks and papers received 14, 16, 19, 20, 24, 25, 27, 29
II Messages of Presidents 522, 539 15
II " " Governors (N. Y.) 1119 15
V " " 199 19
Am. State Papers, Ind. Af. 14
Bingham, Cradle of the Queen City (Bflo. 1931) 14
56 Decisions Dept. of Int. 39 5
Elliot's Debates 10
Hartford Compromise 1786 9
Hoebel, Iroquois Law and Order (1945) 33
Hough, Proceedings Comrs. Ind. Af. (Albany 1861) .. 9
Indian Land Cessions in U. S. (Washington 1899) 9
Jefferson Mss. Library of Congress 14
III Kent's Commentaries, 383 15
Madison, James, Writings (N. Y. 1900) 9
Manley, Treaty of Ft. Stanwix (Rome 1932) 8, 9
Monroe, James, Writings (N. Y. 1898) 9
Op. Atty. Gen. (unreported, Mar. 26, 1819) 12
Cuthbert W. Pound, 22 Col. L. Rev. 97 6
Stone, Red Jacket (Albany 1866) 14, 16
N. Y. Assembly Mss., N. Y. S. Library 14, 18
N. Y. Assembly Doc. 168 of 1836 24
N. Y. Senate Docs. 93, 94, 104 of 1845 19
N. Y. Assembly Doc. 207 of 1847 26
N. Y. Senate Doc. 108 of 1850 19
N. Y. Assembly Doc. 108 of 1859 26
N. Y. Assembly Doc. 28 of 1860 19
N. Y. Assembly Doc. 30 of 1875 29
N. Y. Assembly Doc. 51 of 1889 19

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WALTER B. MARTIN, as Warden of Attica State Prison,
Attica, New York,
Appellee.

BRIEF FOR THE WARDEN AND THE STATE OF NEW YORK.

Question.

The ultimate question presented is whether the penal laws of the State of New York apply to a non-Indian charged with the murder of another non-Indian within the confines of the City of Salamanca, or whether such a crime is solely within the purview of federal law. More specifically, the question is whether N. Y. Indian Law § 71, as enacted by L. 1881 c. 188, which provides that "all the general laws of the State" extend over and apply to Salamanca,* is void under any provision of the Constitution of the United States, particularly Article 1, Section 8, Clause 3.

* The most relevant portion of this statute is Appendix H to petitioner's brief, p. 40.

How it arises.

Obviously such a question arises only because of certain peculiarities in the history and organization of the City of Salamanca. This City is within the boundaries of the Allegany Reservation, which until a hundred years ago was completely, and is now for its greater part, a reservation of the Seneca tribe of Indians. The City is differentiated from other parts of the reservation by having passed into white possession, and de facto into white control, under certain long-term leases authorized by an Act of Congress of 1875 (18 Stat. 330).

The petitioner, Ray, is confined to Attica State Prison for life, having been sentenced following conviction in a State court for felony murder, as provided in N. Y. Penal Law §§ 1044, 1045a.* No denial of State jurisdiction was suggested at the trial or upon the appeals which followed (R. 6 par. 18; R. 43-44).

In March 1943 the present question was raised for the first time, in a habeas corpus proceeding, based on some extreme statements as to the federal jurisdiction over Salamanca to be found in *United States* v. *Forness*, 125 F. 2d 928 (cert. den., 316 U. S. 694).

The proceeding having been initiated in a federal court, District Judge John Knight decided against the petitioner on the merits and also on the ground that the question should first be presented to the State courts. *Ex parte Ray*, 54 F. Supp. 218; R. 7-12. The Circuit Court of Appeals, Second Circuit, affirmed. *United States ex rel. Ray* v. *Martin*, 141 F. 2d 300; R. 12-13. The principal opinion was by Judge Frank, who also wrote the opinion in the *Forness* case, and was upon the narrow ground that "the application for the writ to a federal court was prematurely made."

* Printed as Appendix I to petitioners brief, p. 43.

Judge Swan, who concurred in that opinion, had not participated in the *Forness* decision. Judge Clark, who like Judge Frank sat in both cases, expiated his having acquiesced in the luxuriant dicta of the earlier case by a separate memorandum in the *Ray* case to the effect that he agreed with the District Judge upon the merits as well as the procedural question.

A new petition for habeas corpus having been filed in the State courts, the decisions have uniformly been adverse to the petitioner upon the merits. *People ex rel. Ray* v. *Martin*, 181 Misc. 925, R. 20-33; aff'd 268 App. Div. 218, R. 36-39; aff'd 294 N. Y. 61, R. 43-55.*

Quaere, whether the question previously stated can be raised by habeas corpus.

The Court of Appeals responded to this doubt by citing *People ex rel. Carr* v. *Martin*, 286 N. Y. 27, 31, 32 (R. 44, top of page). The reference obviously to dictum in that opinion, because the decision 'self is opposed to the use of habeas corpus to present belated defense. That indictment alleged that Carr stole certain rings "owned by Rose Davin." He pleaded guilty and was sentenced, but subsequently in a habeas corpus proceeding he challenged the jurisdiction of the sentencing court, upon the ground that Rose Davin was his wife and he could not be guilty of larceny from her. The Court of Appeals, after stating the general rule that a plea of guilty is an admission of the allegations contained in the indictment, observed that Carr's defense could have been raised under a plea of not guilty, and that the People certainly did not have the bur-

* The opinion of the Court of Appeals as printed in the present record contains numerous errors eliminated in the official report, for which reason a certified copy of the corrected opinion has been filed with the Clerk of the Court.

den of alleging or proving that Rose Davin was *not* Carr's wife. It was decided that the defense could not be raised by habeas corpus.

A trial and verdict of guilty has the same conclusive effect as a plea of guilty. An interesting recent case illustrating this point, and in some respects the converse of the present one, is *Davis* v. *Johnston*, 144 F. 2d 862 (9th Cir., 1944; cert. den., 323 U. S. 789, 819). Davis was indicted in a federal court for a murder alleged to have been committed in the "Indian country", specifically the Rosebud Indian Reservation in South Dakota.* After conviction and sentence to Alcatraz for life, he presented in a habeas corpus proceeding the point that the premises which were the scene of the murder were allotted and hence had ceased to be reservation. The decision was against him, on the ground that the jurisdictional defense was one he could have raised under his plea of not guilty to the allegations of the indictment.

Rice v. *Olson*, 89 L. ed. 903 (Apr. 23, 1945; apparently not officially reported) will indicate why no more definite position is taken against the present petition in its procedural aspects. See also, *Matter of Morhous v. N. Y. Supreme Court*, 293 N. Y. 131.

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* Murders committed on Indian reservations within state boundaries fall into the exclusive jurisdiction of federal courts in two classes of cases: (a) Under 18 U. S. C. § 548, when committed by an Indian, which is illustrated by *People ex rel. Cusick* v. *Daly*, 212 N. Y. 183, but certainly is not the present case. (b) Under 18 U. S. C. §§ 451 and 452 and 25 U. S. C. § 217, when committed in the "Indian country," subject to certain exceptions and doubts (cf. *United States* v. *Bailey*, 1 McLean 234). The *Davis* case was of the second class, and petitioner says such is the present case. This brief contends, as a first answer to that proposition, that Salamanca is not "Indian country," relying upon *Benson* v. *United States*, 44 Fed. 178, and other authorities noted hereinafter.

The State jurisdiction is not doubtful

No inference of weakness in the State's position should be drawn from the length of its brief. The State could readily defend all the ground needed for mere decision, upon the relatively narrow doctrine stated in an opinion of the Solicitor of the Interior Department dated December 11, 1936 (56 Decisions of Dept. of Int. 39) as follows:

> "It is also well settled that a State may punish a non-Indian for an offense committed against another non-Indian within an Indian reservation, unless the United States in establishing the State itself has reserved absolute and exclusive jurisdiction over the territory of the reservation. *Draper* v. *United States*, 164 U. S. 240; *United States* v. *McBratney*, 104 U. S. 621.
>
> "The theory underlying all the foregoing decisions appears to be that control over Indian conduct and Indian property on an Indian reservation is reserved to the United States, while for all other purposes the State may exercise a police jurisdiction over the territory of the reservation."

Citing the same two cases, the United States Attorney appeared before District Judge Knight in the present case and conceded the State's jurisdiction over Salamanca (R. 11). The opinions of Judge Knight and Circuit Judge Clark herein, as well as the State courts, uphold the jurisdiction. The decision of the Circuit Court in 1890 in the case of *Benson* v. *United States*, 44 Fed. 178, is squarely opposed to the petitioner's arguments. Acceptance of them now would involve a substantial revision of history (R. 18-19).

It is, however, important to the interests of the City of Salamanca and to the State to have the jurisdiction upheld on broader and truer grounds; not a narrow ground equally applicable to western reservations which will merely encourage more litigation as to Salamanca and cast

doubt over all its institutions; but one based upon its peculiar history and unique organization. For that reason this brief will devote more than half its pages to a statement of historical background, and will append a digest of all the decisions of this Court and of the Circuit Court of Appeals relative to the New York Indians. We do this because we are conscious of the truth of the observation made by Judge Cuthbert W. Pound in 1922 concerning the body of law dealing with jurisdiction over the New York Indians (22 Col. L. Rev. 97-102):

> "The present confusion and uncertainty discredits the lawsuit between individuals as a means of deciding great questions of state and national jurisdiction."

The *Forness* decision of the Circuit Court of Appeals, which inspired this litigation, seems to us a notable contribution to that confusion and uncertainty. Accordingly, at the risk of being wearisome, we shall trace the devolution of lands in western New York, showing how Salamanca attained its unique character of a white man's city in the midst of an Indian reservation; and likewise we shall trace the development of the peculiar body of law applicable to the Indians of New York, attempting to show why authorities concerning the southern and western Indians are merely confusing; all of which probably goes beyond the needs of the present brief, but is not completely irrelevant to it. More directly relevant will be the argument that no federal act forbids the jurisdiction to the State courts or confers it upon federal courts; and that "all the general laws of the State" do indeed extend to Salamanca.

Summary of Argument.

Point I. Indian Law § 71, insofar as it provides that "all the general laws of the state" extend over and apply to Salamanca, is not inconsistent with the Constitution of

the United States, particularly Article I, Section 8, Clause 3, or with any treaty entered into or laws enacted thereunder.

A. Historical Background (pages 8-32).

(a) Jurisdiction over Indian affairs under the Articles of Confederation (pages 8-9).

(b) Drafting of Indian provision in the Constitutional Convention of 1787 (pages 10-11).

(c) Treaty of Canandaigua in 1794 (pages 12-13).

(d) Development of criminal jurisdiction by New York State over the Seneca Indians and indications of approval by Congress, the executive departments of the United States and this Court, in the period 1794-1929 (pages 14-23).

(e) How parts of the Allegany Reservation, particularly Salamanca, became predominantly communities of non-Indians in the period 1836-1942, including enactment of the Act of Congress of 1875 and the New York statute of 1881 (pages 24-31).

B. Argument of Specific Points (pages 32-43).

(1) There is no inconsistency between the State jurisdiction asserted and the seventh article of the Treaty of Canandaigua (page 32).

(2) Indian Law § 71 is constitutional even without express authorization by Congress (pages 32-33).

(3) However, Indian Law § 71 was authorized by Congress in the 1875 Act (page 34).

(4) The Forness decision does not hold to the contary (pages 34-36).

(5) Salamanca is not "Indian country" and hence 25 U. S. C. § 217 does not render 18 U. S. C. §§451 and 452 applicable (pages 36-43).

POINT I.

Indian Law § 71, insofar as it provides that "all the general laws of the state" extend over and apply to Salamanca, is not inconsistent with the Constitution of the United States, particularly Article I, Section 8, Clause 3, or with any treaty entered into or laws enacted thereunder.

Historical Background.

Similarly to the condition before the Revolution, when it had never been settled definitely whether the Iroquois were sovereign allies of the Crown or were dependent upon the colonial government,* so the Articles of Confederation indicated an indefinitely divided control over Indian affairs. Congress was given, "the sole and exclusive right and power of regulating the trade and managing all affairs with the Indians", but the clarity of that grant of power was then obscured by two ambiguous provisos: It was limited to Indians who were "not members of any of the States", and was further limited and obscured by the language, "provided that the legislative right of any State within its own limits be not infringed or violated."

An exchange of letters between James Monroe and James Madison immediately after the Treaty of Fort Stanwix in 1784 has preserved their interpretation of the Articles of Confederation, confirmed by other documents

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* "The colonists of New York asserted the Iroquois dependency upon that province, and could point to many recognitions of it. Until the ascendancy of Sir William Johnson the Board of Indian Commissioners at Albany controlled all dealings with the Indians of that province. Probably it was to put his dealings with the Indians outside the meddling of the provincial government, as well as to flatter the Indians, that Johnson, deriving his authority from the Crown, recognized their sovereignty, notwithstanding that the attorney general insisted upon their dependency." Manley, *The Treaty of Fort Stanwix* (Rome 1932), p. 23.

of the period, that the Articles saved to the State of New York at least the right to acquire lands from the Indians within its borders.* The same interpretation was implicit in the Hartford Compromise of 1786, by which Massachusetts and New York settled their conflicting claims upon western New York by drawing a north-and-south line approximately through Geneva, still known as the "Preemption Line", because Massachusetts was awarded the "preemption rights" to all land lying west of that line, New York being assured such rights to the east, and also "the government, sovereignity and jurisdiction" of all the lands involved. The Hartford Compact was approved by Congress.

In the years 1785 to 1790 and even thereafter New York held treaty after treaty by which it purchased the other element of title, the so-called "Indian title" or possessory right, to nearly all the land in the State between the Geneva line and the Rome line. The United States was, of course, informed of those transactions, but did not participate in them.†

In the same period there was being drafted and adopted the Constitution of the United States. Assuming that its interpretation as to Indian affairs was decided by Chief Justice Marshall's opinion in *Worcester* v. *Georgia*, 6 Peters 515 (1832) beyond the possibility of any present enlightenment, nevertheless attention to the various phrases

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* Vol. I, *Writings of James Monroe* (N. Y. 1898) p. 46:
Vol. II, *Writings of James Madison* (N. Y. 1900) p. 91.
These and other documents are quoted in Manley, *The Treaty of Fort Stanwix*, pp. 108-111.

† Hough, *Proceedings of the Commissioners of Indian Affairs*, (Albany 1861) is a publication of the official report of the earlier treaties. The principal ones are summarized, as "contracts," in the volumes of *Indian Treaties* published at Washington in 1826 and 1837, at pp. 17-25 in the former, and pp. 40-48 in the latter. See also *Indian Land Cessions in the United States* (Washington 1899).

proposed in the constitutional convention of 1787 will aid to an understanding of the viewpoints of the period.

On August 18, 1787, Madison introduced in the convention a proposition to give various powers to Congress, among them:

> "To regulate affairs with the Indians, as well within as without the limits of the United States." (5 Elliot's Debates, 439.)

Undoubtedly that language was designed to take to Congress the jurisdiction which New York State had theretofore maintained and been exercising. On August 22 the committee to which the matter had been referred reported that the power should be given:

> "to regulate commerce * * * with the Indians within the limits of any state, not subject to the laws thereof." (5 Elliot's Debates, 462.)

Probably that qualified language was to relieve apprehension of New England states which for many years had extended their laws over Indians within their bounds, but it was expected to restrain New York State under the conditions then existing. Neither of those provisions was adopted. What was adopted was another form of words, presumably meaning something different, and apparently meaning something less:

> "The Congress shall have Power to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes."

That language was agreed upon without debate on September 4, and on September 17 the articles were signed in final form.

The proceedings of the convention remained secret until 1819, and until 1837, when Congress paid $30,000 to

Madison's widow to acquire his manuscripts of the debates, few persons saw them. Chief Justice Marshall in deciding *Worcester* v. *Georgia* in 1832 seems to have been unaware of the history of the Indian provision in the convention, and was content at page 558 to say dogmatically that the provision in the Articles of Confederation was "ambiguous", but that the powers of war and peace and making treaties and regulating commerce conferred under the Constitution, "comprehend all that is required for the regulation of our intercourse with the Indians. * * * The shackles imposed on this power, in the confederation, are discarded."

But he also recognized, at page 557, a circumstance wherein the present New York reservations differ greatly from even the Georgia reservations of more than a century ago, that:

> "The treaties and laws of the United States contemplate the Indian territory as completely separated from that of the states."

It is indeed probable that the gentlemen adopting in 1787 the constitutional language about "Commerce with foreign nations, and among the several States, and with the Indian Tribes", thought of the Indian Tribes in a geographical sense, just as "The Indian Country" was referred to and described in the Indian non-intercourse acts passed by Congress in 1790, 1793, 1799, 1802 and 1834 (1 Stat. 137, 329, 743; 2 Stat. 139; 4 Stat. 729) and was shown apart from the states on maps of that day and for many years thereafter.

The Treaty of Canandaigua in 1794 is appended to the petitioner's brief, pages 32-35, and is much relied upon by it. Essentially it was a treaty of peace between the United States and the Six Nations, following immediately

after General Wayne's victory at Fallen Timbers. It also described the Indian lands in such manner as to release from any claim by the United States some lands inadvertently ceded to it at Fort Stanwix. It further provided that the Indian lands "shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." The language last quoted meant those having rights of preemption, notably Messrs. Phelps and Gorham and Morris and others who had succeeded to the rights of Massachusetts, and including the State of New York. When the treaty meant the United States as an entity it said merely "the United States".*

The Allegany Reservation, from which the present legal issue arises, as well as the other Seneca reservations in western New York, first attained separate existence in the Treaty of Big Tree or Geneseo, held in 1797 between Robert Morris and the Seneca Nation, with Jeremiah Wadsworth presiding as a United States commissioner. Therein the reservation was merely described as a "piece or parcel of forty two square miles at or near the Allegany River."†

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* There is much more evidence to the same effect, including the Treaty of Big Tree in 1797 to be mentioned below, and the language in the Treaty of Buffalo Creek in 1842 (Pet. br., bottom of p. 36). By an opinion of March 26, 1819, Attorney General William Wirt advised the Secretary of War as follows: "The legal titles of the States of New York and Massachusetts and of the grantees under them as settled and established by the Convention of 1786 are not divested or in any manner impaired by the treaty of Canandaigua, as to any of the lands then occupied by the Six Nations, nor are the preexisting rights of the Indians in any manner enlarged by that treaty." This opinion appears to be unpublished, but the original is among papers received by the Indian Office, in The National Archives. The Indian Office was in the War Department until 1849, when it was transferred to the newly formed Interior Department.

† The treaty is printed in 7 Stat. 601, also II Kapplers *Indian Laws and Treaties* 1027. The supplemental brief filed by the United States in *People ex rel. Kennedy* v. *Becker*, 241 U. S. 556, contains the Morris and Wadsworth notes on the negotiation of the Treaty in 1797.

Before tracing the history of the Allegany Reservation subsequent to the treaty of 1797, and showing how the then Indian village of Bucktooth subsequently became a junction point on the Erie Railroad and the village of Salamanca, recognized as white territory by an Act of Congress in 1875, and now the uniquely organized City of Salamanca, there is another topic to be stated. That is the development of criminal jurisdiction by the State of New York over the Seneca Indians, and the long record of approval by the United States.

The Treaty of Canandaigua in 1794 contained in its seventh article a provision, "that for injuries done by individuals on either side, no private revenge or retaliation shall take place", but complaint shall be made by the Six Nations to the President, etc. (Pet. br. pp. 34-35). The Court of Appeals has held, correctly, it is believed, that this was not a provision for ordinary criminal jurisdiction (R.46). The viewpoint as to that is illustrated by a treaty shortly before and by Indian non-intercourse acts shortly after. In the Treaty of Fort Harmar in 1789 between the United States and the Six Nations it was provided that Indians guilty of robbery, murder or horse stealing, committed "upon the citizens or subjects of the United States", should be delivered by the tribe to the nearest military post if the crime was committed within the territory of the United States, or to the civil authority of the state within which it happened (7 Stat. 33; II-Kappler 23). Similar provisions were in the Indian non-intercourse acts of 1790, 1793, 1799, 1802 and 1834. For instance, sections 14 and 19 of the 1802 act (2 Stat. 139) contained the provisions:

> "Nothing herein contained shall prevent the legal apprehension or arresting, within the limits of any state or district, of any Indian, having so offended."
>
> "Nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands sur-

rounded by citizens of the United States, and being within the ordinary jurisdiction of any of the individual states."

Two locally famous murder trials in the State courts were used by Red Jacket in vain attempts to establish the immunity of his people from the white men's laws. The first was that of Stiff-Armed George, at Canandaigua in 1802. The second was that of Tommy Jemmy, at Buffalo in 1821. Each murder was by an Indian upon the Buffalo Creek Reservation, the first victim being a white man and the second an Indian woman. Each resulted in conviction and a special act of pardon by the Legislature. The trial in 1802 was before Henry Brockholst Livingston, then a judge of the New York Supreme Court sitting at circuit. President Jefferson in official correspondence expressly approved the action taken, defended it before a Seneca delegation in Washington, and four years later appointed the judge to this Court.*

* The main facts of these two trials may be found in Stone, *Life and Times of Red Jacket* (Albany 1866) pp. 258-264, 383-387; also in Bingham, *The Cradle of the Queen City* (Bflo. Hist. Soc., 1931) pp. 178-179, 386-388. Letters of Aug. 14, 1802, from Secty. of War Henry Dearborn to Capt. Israel Chapin and Callender Irvine (the former recently removed as U. S. Indian Agent and the latter his successor) thank Chapin for having secured the murderer, and direct Irvine to go with Major Porter to the Senecas and urge them to keep the peace. National Archives, Indian Office letterbook A, page 264. At pages 312-315 is a speech by President Jefferson to a delegation from the Six Nations, assuring them that the courts of New York had jurisdiction to try the offense, but holding out the hope that grounds for pardon would be found. President Jefferson had already been in communication with Governor George Clinton about a pardon. Clinton's letter of Aug. 21, 1802, is in Am. State Papers, Ind. Af., Vol. I p. 667. Jefferson's letter of Sept. 6, 1802, to Dearborn is in the Jefferson mss., Library of Congress. In 40 Assembly mss., N. Y. S. Library, at pages 385 and 393 are a petition from the grand jurors of Ontario County and a speech by Red Jacket to the Governor, both interceding for the condemned. A letter of Feb. 14, 1803, from Dearborn to Gov. Clinton is at page 389; the Indian Office copy is in letterbook A page 319. Stiff-Armed George was pardoned by L. 1803 c. 31, on condition that he and the chiefs of the Seneca Nation give satisfactory assurances that he would immediately leave the State and not return.

Tommy Jemmy justified his murder of a old woman, committed upon the Buffalo Creek Reservation, upon the ground that she had been convicted in a tribal court of witchcraft, and he had officiated as executioner. This event aroused the Legislature, while pardoning the Indian executioner, to deny the jurisdiction of the tribal courts, and solemnly to assert:

> "That the sole and exclusive jurisdiction, of trying and punishing all and every person, of whatsoever nation or tribe, for crimes and offenses committed within any part of this state, except only crimes and offenses as are or may be cognizable in courts deriving jurisdiction under the constitution and laws of the United States, of right belong to, and is exclusively vested, in the courts of justice of this state, organized under the constitution and laws thereof." (L. 1822 c. 204.)

This statute seems to have had the approval of Chief Justice Ambrose Spencer and other judges, including Chancellor Kent.* The Committee on Indian Affairs of the House of Representatives, in a report dated February 24, 1830, considered the entire history of the matter and commented as follows upon the New York statute:

> "The law declaring the jurisdiction of that State has been enacted several years and the committee do not find that its validity has ever been seriously questioned." (21st Cong., 1st Sess., H. R. 227 p. 12. Serial Vol. 200.)

Similar views as to jurisdiction over the New York Indians were expressed by President Jackson in his second annual message, in 1830 (II Mess. Pres., 522), and in a message to the Senate dated February 22, 1831 (*Ibid.* 539).

* II Mess. Gov. 1119, 1120; *Goodell* v. *Jackson*, 20 Johns. Rep. 694, 716; III Kent's Comm., 383, note; and see also *Hatch* v. *Luckman*, 64 Misc. 508, 515-516.

Indictments of this period, now in the custody of the Erie County Historian, attest that these two murder trials were merely outstanding examples of a general criminal jurisdiction over the reservations then being administered by the State. It was in reference to this fact that a Seneca delegation, unpersuaded by Red Jacket's ideas of Indian sovereignty, on July 10, 1819, addressed a United States representative as follows:

> "You said we could not remain independent: we are sensible of this, and would undergo a gradual change: for instance, in case of crime now, we are not independent—we are punished. We foresee that we cannot remain independent."*

Worcester v. *Georgia* is usually remembered only for the opinion of Chief Justice Marshall and the controversy about the Cherokees. The concurring opinion by Mr. Justice McLean probably is a more reliable guide to viewpoints of the period. He seems to have been in a position of peculiar detachment from the Jackson-Marshall animosity, having been promoted from the Cabinet to this Court because of his differences with the President about his patronage policy. His opinion is as lengthy as that of the Chief Justice and shows more information upon the matters now under discussion. He said:

> "In some of the old states, Massachusetts, Connecticut, Rhode Island, and others, where small remnants of tribes remain, surrounded by white population, and who, by their reduced numbers, have lost the power of self-government, the laws of the state have been extended over them, for the protection of their persons and property." (p. 580.)

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* National Archives, Indian Office papers received, an official report of Morris J. Miller to the Secty. of War dated July 25, 1819. Substantially the same is reported in Stone, *Life and Times of Red Jacket* (Albany 1866) p. 375.

"Has Georgia ever, before her late laws, attempted to regulate the Indian communities within her limits? It is true, New York extended her criminal laws over the remains of the tribes within that state, more for their protection than for any other purpose. These tribes were few in number, and were surrounded by a white population. But, even the state of New York has never asserted the power, it is believed, to regulate their concerns beyond the suppression of crime." (p. 590.)

"If a tribe of Indians shall become so degraded or reduced in numbers, as to lose the power of self-government, the protection of the local law, of necessity, must be extended over them. * * * Under such circumstances, the agency of the general government, of necessity, must cease." (pp. 593-594.)

Mr. Justice McLean's views as to the limitations on the federal power over Indians were again illustrated in 1834, in the case of *United States* v. *Bailey*, 1 McLean 234; 24 Fed. Cas. 937, no. 14495. At Circuit in Tennessee there came before him the case of a white man indicted under a federal act of 1817 for killing another white man in the Cherokee Reservation. He held the act asserting federal jurisdiction over such a crime to be unconstitutional, as beyond the power of Congress to "regulate commerce with the Indian tribes." Incidentally, he referred again to the fact that "the state of New York for many years has punished its citizens for crimes committed in the Indian territory within its limits."

In 1859 Mr. Justice McLean was still a member of this Court, when New York's jurisdiction over a Seneca reservation was upheld in direct litigation. *New York ex rel. Cutler* v. *Dibble*, 21 How. 366. The statute which was involved dated back to 1813, when New York forbade cutting of timber on Indian lands, prosecution to be by the Indian Agent appointed by the United States (L. 1813 c. 91). In 1821 the Senecas petitioned the State, asserting

that the Indian Agent had been negligent in enforcement of the statute, and requesting that the State assume more direct responsibility.* By amendment district attorneys in the respective counties were made responsible for prosecuting all intruders on Indian lands (L. 1821 c. 204). It was the action of the Genesee County Judge, Dibble, in removing Cutler and other alleged intruders from the Tonawanda reservation, under authority of that statute, which was challenged in the case cited. The statute was held constitutional and the removal of the intruders was upheld, this Court saying:

> "Notwithstanding the peculiar relation which these Indian nations hold to the Government of the United States, the State of New York had the power of a sovereign over their persons and property, so far as it was necessary to preserve the peace of the Commonwealth, and protect these feeble and helpless bands from imposition and intrusion. The power of the State to make such regulations to preserve the peace of the community is absolute and has never been surrendered."

The Senecas were a bitterly divided people for some years after 1838, as a result of an iniquitous treaty in that year purporting to surrender all their New York reservations. The Cattaraugus and Allegany reservations were saved to them by a compromise treaty of 1842, and for the past hundred years the main body of the Senecas has lived upon those two reservations. The Tonawanda band seceded and eventually saved its own reservation in another treaty of 1857. Dissatisfied with the guardianship of the United States, they stipulated in the treaty that the reservation be transferred from the trusteeship of the Secretary of the Interior to that of the State Comptroller. Laws

* The petition was dated February 21, 1821, signed by Red Jacket, Cornplanter and others, and is in Assembly mss., N. Y. S. Library, Vol. 41 pp. 235, 243.

defining their government were enacted at their request, and since that time the relationship between the Tonawanda band and the State has rarely been questioned.*

The State was called upon by the main body of Senecas to provide it, likewise, with a body of laws defining the functioning of its government. John C. Spencer, who was Secretary of War in 1841-1843 and who appointed his father, Judge Ambrose Spencer, to preside over the compromise treaty of 1842, assisted the Senecas in drafting and procuring the enactment of this legislation.† In 1848 occurred the Seneca "revolution" or change to government under a written constitution, and both the United States and the State promptly recognized the new government.

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* The treaty of 1838 is in 7 Stat. 550, 557 and II Kappler 502, 509; that of 1842 is in 7 Stat. 586 and II Kappler 537; and that of 1857 is in 11 Stat. 735 and II Kappler 767. An account of these transactions is in Assembly Doc. No. 51 of 1889, pp. 24-31. The original legislation for the Tonawanda band was L. 1860 c. 439, 481, and L. 1861 c. 283, and the petition of the Indians for those laws is Assembly Doc. No. 28 of 1860, also V Gov. Mess. 199. See, as to the history and present status of the Tonawanda band, *United States* v. *National Gypsum Co.*, 141 F. 2d 859 (C. C. A. 2d Cir., 1944).

† The legislation was L. 1845 c. 150, subsequently amended by L. 1847 c. 365. The fact that the law was petitioned for by the Senecas with the assistance of John C. Spencer appears from Senate Docs. 93, 94 and 104 of 1845. Also a letter dated March 26, 1849, from Congressman Dudley Marvin to Secty. of Int. Ewing, now in the National Archives, Indian Office papers received, said of the 1845 and 1847 statutes: "These acts to which I have called your attention were not imposed upon the Indians by the State Legislature against their wishes. The attention of the Legislature in each instance was called to the subject by petition from the Indians themselves. And, as I am informed, the Indians having agreed among themselves as to the general features of the measures proposed for their improvement, a program was submitted by their agent to that able counsellor the Honorable John C. Spencer, who threw them into form, giving the Indians the benefit of his own suggestions, and that the respective bills thus prepared, after undergoing some slight modifications in the Legislature, were enacted into laws." See also Mr. Spencer's letter of March 1, 1850, appended to Senate Doc. No. 108 of 1850, p. 12.

A letter dated March 13, 1849, from Commissioner of Indian Affairs Medill to Secretary Ewing suggested transmission to State authorities of copies of documents indicating their actions:

> "That State having also relations with the Indians, and the subjects referred to in the above communications being now under consideration by her legislature on a memorial similar to that to the President." (National Archives, 6 Ind. Of. Rep. Bk. p. 126.)

The State's recognition of the new Seneca government was expressed by L. 1849 c. 378.

A letter of May 2, 1850, from President Zachary Taylor to the chiefs of the Seneca Nation, declined to reverse the action previously taken, saying:

> "It has also received the sanction of the State of New York, which claims a guardianship concurrent with that of the United States over the Seneca Nation. If therefore any change be now made it must be by the authorities of that State as well as by the action of the United States Government." (Copy in National Archives, Indian Office papers.)

The annual report of the Commissioner for 1850, at page 41, spoke optimistically of the condition in which the Senecas in New York had been placed, "by the humane legislation of the State."

Another illustration of the official viewpoint of that period as to relations subsisting between the State and the Seneca Indians is found in the 1864 annual report of the Commissioner, a letter from him to the President of the Seneca Nation, saying:

> "The adoption, by the Senecas, of a republican form of government, and a written constitution, was, I understand, an act of mature deliberation, done under

> proper authority from the State of New York conferring upon them powers of incorporation. It was duly reported to this department, and fully recognized and confirmed by it."

In various annual reports of the Commissioner and similar official documents in the latter part of the nineteenth and early twentieth century the existence and propriety of such State legislation were acknowledged from time to time. Thus, in the Commissioner's report for 1874, p. 23, it was said concerning the New York Indians: "The jurisdiction of the criminal courts of New York has already been extended over them." And his 1889 report said: "The People of the Seneca Nation are governed by two sets of laws—the laws of the State of New York, which was enacted for the protection and improvement of the Seneca Nation of Indians, on the one hand, and the ancient customs and usages of the Senecas on the other; and quite frequently they claim rights under both." His report for 1892 contained a reference to the new Indian Law as recently codified by the New York Legislature, a copy of which was forwarded to the Commissioner by his New York agent. In his 1897 and 1898 reports the Commissioner included an instruction to his New York agent to procure an amendment to the N. Y. Indian Law which would allow appeals from peacemakers courts to State courts. This was finally done by L. 1914 c. 508, but was repealed by L. 1915 c. 561.

Similar examples of recognitions of State authority by the Federal Government could be given for each year. For present purposes the matter can be summarized from two congressional documents and the most recent opinion of this Court relative to the New York Indians, as follows:

In 1914 the Secretary of the Interior directed a survey to be made of the problem of Indian jurisdiction and con-

ditions in New York State, and reported upon it to Congress. This is generally known as the Reeves Report, because Mr. John R. T. Reeves conducted the survey. (*House Doc. No. 1590, 63rd Cong. 3rd Sess.*) Among other things, it listed the State statutes and decisions relative to the New York Indians, and made this general report as to jurisdiction over them, which was adopted by Secretary Lane as his report to Congress:

> "Conditions on the remaining reservations show a crying need for reform. Naturally one casts about for the reasons why these conditions should have so long been permitted to continue. First among these we find the question of jurisdiction over these Indians, State and Federal. Much needless confusion exists, a pretty general impression prevailing that the State has exclusive jurisdiction. This seems to have arisen from two causes, first, because New York was one of the Thirteen Original Colonies and the title to the lands involved never was in the Federal Government, and secondly, because the State has exercised jurisdiction, while the Federal Government, to a large extent, has not. In brief, the principle involved may be broadly stated, that all State laws beneficial to Indians will be upheld, while those of a detrimental nature will be scrutinized with greater care."

In 1929 Secretary Ray Lyman Wilbur expressed similar views about the New York Indians, in several letters to the Senate and House Indian Committees. The following quotation is from his letter of October 12, 1929 to Senator Frazier, printed at page 189 of a report of *Hearings on H. R. 9720, 71st Cong., 2nd Sess.* Secretary Wilbur advised Chairman Frazier:

> "The situation with respect to the Indians in the State of New York is somewhat peculiar and is entirely different from that of most of the other Indian problems with which this department must deal, particularly those west of the Mississippi River. This

> is due in large measure to the fact that New York was one of the thirteen original colonies and the legal title to none of the lands in that State is in the United States * * *. Again, shortly after the Revolutionary War, particularly prior to the adoption of our Federal Constitution and ever since that date, under the doctrine of State rights so strongly prevalent in those days, the State of New York has dealt directly with these Indian tribes claiming lands within her borders. In some instances such transactions were had with the sanction of the Federal Government and in others without such sanction other than such as might be implied. That is, as to those transactions between the Indians and the State not expressly sanctioned, no protest or opposition thereto has ever been raised, at least in so far as the legislative and executive branches of the Federal Government are concerned. * * *. In short, the State has heretofore exercised the usual prerogatives of sovereignty and jurisdiction over these Indians, while the Federal Government to a large extent has not."

See also, *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13 (1926), particularly pages 16-17, leading to the conclusion:

> "It is enough for present purposes to say that the State of New York, as early as 1849, at the request of the Indians, assumed governmental control of them and their property * * * and that Congress has never undertaken to interfere with this situation or to assume control."

The general course of development of control by the State over the Senecas, particularly criminal jurisdiction, with approval of the United States, has thus far been indicated. More specific attention can now be given to the development of the Allegany Reservation and Salamanca.

In 1797 and for many years thereafter the present site of Salamanca was an Indian village known as Bucktooth.

The principal factors which initiated a change to the present status were lumbering and railroads. In 1836 the New York Legislature refused to confirm contracts made by Blacksnake and other Seneca chiefs for leasing waterpower and timber-cutting privileges on the Allegany Reservation, its committee reporting that the proposal was against State policy (1836 Assembly Doc. No. 168). But in the same year the Legislature enacted a general statute which purported to authorize leases of lands from Indians for railway purposes (L. 1836 c. 316). It appears from the record in *People ex rel. Erie R. R. Co.* v. *Beardsley*, 41 N. Y. 619 mem., that construction was commenced on the Allegany Reservation in 1842 but was not completed until 1851.

Records of the Indian Office for 1842 and early 1843, now in the National Archives, show that the project was not opposed by it. The Indian Office was then under direction of T. Hartley Crawford as Commissioner and John C. Spencer as Secretary of War, the former from Pennsylvania and the latter from New York, and neither uninformed about local conditions.

In December 1842 the Indian Office received four long letters from the Allegany Reservation, all about a campaign of removing white intruders then being conducted by the local Indian Agent, one Stephen Osborn of Erie County. One letter was from John Boardman, who described himself as tavern keeper, ferryman and postmaster at Bucktooth, with facilities established on fifty acres leased from the Indians for a term of seventeen years, and profoundly disturbed by the proceedings of the Agent. Another letter was from W. L. Storke, who said he was acting r sident engineer for the railroad which "passes nearly twenty miles through said Reservation, and is in a very forward state of construction." He asked permis-

sion for the persons employed to return to their houses, "which were built only to reside on during the construction of said Rail Road." A third letter was from Blacksnake and other Seneca chiefs, asking that the persons operating mills or shops on the reservation under leases from them be undisturbed. Those three letters were addressed to the Secretary, and the fourth was from the Agent to the Commissioner, reporting his proceedings with apparent assurance that he was executing the policy of his superiors.

He was corrected upon that point by a letter of January 9, 1843, from Commissioner Crawford, as follows:

> "Your letter of 26th ult. respecting depredations upon the lands of the New York Indians and the measures taken by you to prevent them has been received. It is observed that you have caused warrants to be issued for the removal of individuals from the Indian lands. No such instructions were given to you nor was it intended that you should interfere by any legal process to effect that object. These are all private rights and must be settled by recourse to the laws of the state of New York by the parties injured. You are, therefore, requested to notify the injured parties of what you have done in the premises and suggest them to take charge of the legal measures instituted or otherwise adopt means to protect their own rights and interests as they may judge most advisable under the laws of the State of New York. Your own future operations will be governed by the instructions heretofore given you." (National Archives, Indian Office letterbook No. 33 p. 206.)

Agent Osborn promptly replied that he had made it clear to all concerned that his proceedings were not to be imputed to the United States, but were steps taken by him under State law by request of some of the Indians. Commissioner Crawford answered on January 28 that he was glad to be informed that Osborn's conduct was not by vir-

tue of his office, and there was no objection under those circumstances "in extending your aid to the Indians in their appeal to the laws of the State." (letterbook 33 p. 258).

In 1847 the State Comptroller, in response to a resolution of the Legislature, reported a list of intruders removed from the Allegany Reservation from 1839 to date, indicating that the same persons were removed repeatedly, at a considerable expense to the State for fees of justices and sheriffs (1847 Assembly Doc. No. 207). In that same year the Legislature authorized John Boardman to lease from the Senecas not to exceed twenty-five acres of land at Bucktooth for a term of five years for a residence, post office and ferry (L. 1847 c. 466). On May 15, 1851, there was a grand opening of the Erie Railroad, at which time President Millard Fillmore and members of his Cabinet and Senators rode the length of the newly constructed line in a special train. The junction with another railroad and the railroad shops at Salamanca came later, about 1863, and the settlement derived its name from the visit of a Spanish nobleman who owned stock in the railroad. As the community grew the Legislature was asked to confirm leases from the Senecas and from time to time did so, by general or special acts (see, for examples, L. 1866 c. 30, 263, 472).

Criminal jurisdiction probably followed as a matter of course. A legislative report in favor of erecting a highway bridge across the Allegany River east of Salamanca on the reservation recited that, "the county is burdened and taxed to pay for the administration of criminal justice over the Indian territory, and extending aid to the poor of their nation" (1859 Assembly Doc. No. 108).

Sometime in 1870 George Barker, Justice of the New York Supreme Court, held that the leases were void unless

ratified by Congress.* A resolution was adopted by the Legislature on January 26, 1871, asking that Congress enact legislation whereby white persons in the Town of Salamanca could acquire titles (L. 1871 p. 2179). The 1872 report of the Commissioner of Indian Affairs referred to such legislation as pending before Congress (pp. 200-201). Such a bill was introduced by Congressman Sessions on April 15, 1872, but as amended in the Senate was much broader than the bill eventually enacted in 1875; it was opposed by the Senecas and not signed by President Grant. (Cong. Globe, 42nd Cong. 2d Sess. pp. 2439, 4284; 3rd Sess. 761, 1666, 2137).

There undoubtedly was strong support for such legislation. The 1874 and 1875 reports of the recently established Board of Indian Commissioners indicate that its secretary, Whittlesey, visited the Seneca reservations in October 1874 accompanied by the Commissioner of Indian Affairs, Edward P. Smith, and his New York agent, Daniel Sherman. They addressed the Senecas in council and advised them to ask Congress to legalize and confirm the leases to white settlers in such manner as to benefit the whole people instead of a few lucky individuals. The 1875 report further said:

> "This board believes that the interests of all parties concerned would be advanced by a transfer of the Indians upon the seven reservations in the State of New York to the authorities of that State. * * * We are pleased to learn that the Interior Department heartily concurs in the recommendation."

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* Petitioner's brief, page 17, appears to be in error in fixing 1874 as the date of this decision. A letter dated December 6, 1870, from H. F. Allen to Commissioner Parker, now in Indian Office papers received, refers to this decision, but does not give date or names of litigants. A petition to the Commissioner signed by Hudson Ansley and Daniel Heller on February 6, 1871, refers to the resolution recently passed by the Legislature and a similar resolution of the Cattaraugus supervisors on November 30, 1870.

The Commissioner, speaking for himself in his 1874 report at pages 23-24, was not so radical in his recommendations. He said:

> "These [New York] Indians have always been considered among the most intelligent of their race. They have completely adopted a civilized life, and except for the fact they have so long been treated as so many quasi independent sovereignties in the heart of the State of New York, there is no reason why they should not be declared citizens. The jurisdiction of the criminal courts of New York has already been extended over them, and pending the question of their full citizenship a great benefit would be secured to the New York Indians by authorizing the State to extend over the reservations its laws relating to highways, to stock, and to collection of debts.
>
> "The Allegany and Cattaraugus reservations are the largest in extent, the former lying forty miles along the Alleghany River and one mile in width. Across this reservation, along the Alleghany, the Erie, Atlantic and Great Western, and Rochester and State Line Railroads have been built, and the town of Salamanca and other small villages have grown up. These improvements were made on what were supposed to be leases legally granted by the Indians and confirmed by an act of the State legislature; but the courts have decided that neither Indians nor the State have power to make such leases. There are therefore improvements exceeding $1,000,000 in value, and occupied by over 2,000 people, upon lands without the authority of law. Three parties are interested in the question of this settlement of lease; the Seneca Nation owning this reservation in common, individuals of the nation who claim to have been occupants of lands used for railroad purposes, and the parties who have leased the land in good faith and have made large expenditures in improvements. The interests of all parties concerned require an early settlement of the questions involved in these leases. A satisfactory settlement can be arrived at only through a commission duly authorized, who shall make inquiries upon the report and give full hearing to all parties."

The Commissioner was making inquiries. In October 1874 he instructed Sherman to prepare a list of the outstanding leases and certain data about them. This was a substantial task, but on December 31 Sherman forwarded a massive compilation with his comment:

> "The ground rents charged by the Seneca Nation of Indians, and by individual Indians, are generally at fair and equitable rates."

On January 29, 1875, the New York Legislature enacted a resolution (Assembly Doc. No. 30) which was reprinted as a congressional document (H. Misc. Doc. No. 75, 43rd Cong. 2d Sess.). In the latter form it is printed in the appendix to petitioner's brief, pages 38-39.

The Act of Congress subsequently enacted seems to have had its origin in a report of the House Committee on Indian Affairs of April 20, 1874 (H. R. No. 478, 43rd Cong. 1st Sess.). Mr. Sessions' bill, H. R. 1053, had been referred to this Committee. The Committee's report stated the history of the matter, including the protest of the Senecas against the Sessions bill as amended in the Senate, and recommended as a substitute another bill described as H. R. 3080. This bill seems to be the one which passed the House without debate on May 4, 1874, and is printed in the Congressional Globe of that date, page 3581. It was in substantially its final form, and its last section, which is most relevant to the present matter, was identically in its final form, as follows:

> "That all laws of the State of New York now in force concerning the laying out, altering, discontinuing, and repairing highways and bridges shall be in force within said villages [including Salamanca], and may, with the consent of said Seneca Nation in council, extend to, and be in force beyond, said villages in said reservations, or in either of them, and all municipal laws and regulations of said State may extend over

and be in force within said villages: Provided, nevertheless, That nothing in this section shall be construed to authorize the taxation of any Indian, or the property of any Indian not a citizen of the United States."

There seem to have been no subsequent proceedings on the bill for nine months, and then, on February 2, 1875, it was debated extensively in the Senate and passed with a minor amendment (Cong. Globe, pp. 908-920). Nobody seemed to consider the language of the last section, with its reference to the "municipal laws and regulations" of the State, as requiring any explanation. Senator Hager of California made the only comment which is at all relevant to the present question. Opposing the bill, quite probably because of his anti-railroad leanings, he described at page 918 its alleged drastic effect upon the Indians, in part as follows:

> "Then subsequently the laws of the State of New York are extended over them, and they are subject to appear in the courts of that State and litigate matters in regard to rents and in regard to their possessions and lands; that is, you impose upon them these burdens, that they must necessarily go into the courts of justice with their lawyers, with their witnesses, and be subjected to all the expense that may be necessary to protect their rights if this bill shall go into operation. In my opinion it will amount to a confiscation or rather a sequestration of the entire lands of that nation."

On February 16, 1875, Mr. Sessions reported for a conference committee, which was agreed to, and on February 19 the bill was approved by the President (18 Stat. 330).

The statute which the State enacted, apparently as a complement to the Act of Congress of 1875, is now found in Indian Law § 71. This was originally enacted as chapter 188 of the Laws of 1881. For years McKinney's edition of

the statutes has carried the Act of Congress in a note to the section, apparently upon the view that the federal act authorized the State enactment. Furthermore, the relationship is apparent in the language of the two acts. The federal act says:

> "all municipal laws and regulations of said State may extend over and be in force within said villages: Provided, nevertheless, That nothing in this section shall be construed to authorize the taxation of any Indian, or the property of any Indian not a citizen of the United States."

The State act says:

> "All the general laws of the state are extended over and apply to the same; except that this section shall not authorize the taxation of any Indian or the property of any Indian, not a citizen of the United States."

The renewals of leases authorized by the 1875 Act (18 Stat. 330) could be for only twelve years, a limitation probably imposed in deference to a provision in the State Constitution which made invalid any lease of agricultural land for a greater period (N. Y. Const. 1846, Art. I § 14). By amendment of the 1875 Act in 1890 the limitation was made ninety-nine years (26 Stat. 558). The committee report in favor of such amendment is S. Rep. No. 1680, 51st Cong., 1st Sess. Ninety-nine year leases were negotiated in 1892 under circumstances described in the Commissioner's report for that year, pages 338-340, 345-347. The status of the leases in 1898 is shown by S. Docs. 145, 190, 55th Cong. 2d Sess. (Serial Vol. 3600), and in 1932 by S. Doc. No. 87, 72nd Cong. 1st Sess. (Serial Vol. 9521).

An affidavit in the present record (R. 18-20) describes the development and organization of Salamanca in recent years. It confirms the observation of District Judge Knight, based on the views of the United States Attorney

expressed in the present case, that the State has jurisdiction (R. 11).

Argument of Spetific Points.

(1). There is no inconsistency between the State jurisdiction asserted and the seventh article of the Treaty of Canandaigua.

This article of the Treaty is printed at pages 34-35 of petitioner's brief, and has already been commented upon at page 13 of this brief. We are unable to determine from the references to the provision at pages 13-14 and 17-18 of petitioner's brief whether it contends that the provision still controls criminal proceedings in Salamanca, but apparently it is contended that originally it did so.

Our position is that this treaty provision is utterly inapplicable to the present case, and has long since ceased to have any function for preserving peace in Salamanca. We also have quoted from the Indian non-intercourse acts of 1802, and thereabouts, and have referred to the development of a State jurisdiction in criminal matters affecting the New York Indians, to show that the 1794 Treaty never had the significance attached to it by the petitioner.

Without reference to those matters, it seems clear that Ray's murder of another white person in Salamanca in 1939 was not an injury to the Six Nations threatening to provoke warfare between them and the United States, and hence cognizable under the seventh article of the 1794 Treaty solely by diplomatic representations to be made by the Six Nations to the President.

(2). Indian Law § 71 is constitutional even without express authorization by Congress.

We shall assume that Congress may, if it sees fit, extend the jurisdiction of the federal courts to the crime now involved, that of murder by one white man against an-

other within Salamanca, upon the ground that it has a relationship to Indian welfare, even though somewhat remote. This assumption may be unwarranted (*United States* v. *Bailey*, 1 McLean 234; see also *U. S.* v. *Rogers*, 4 How. 567, 572) but our present case does not require us to argue against it.

As we shall show under the fifth subheading, there is no Act of Congress which confers upon federal courts jurisdiction in such cases as the present, or which forbids the State courts to exercise such jurisdiction. And there is a strong historical justification for State criminal jurisdiction over the New York Indians, previously stated herein.

It may reasonably be assumed that the power of Congress to regulate commerce with the Indian tribes, derived under the same clause with the power to regulate interstate commerce, is of similar nature, and that state laws are valid unless and until Congress has preempted the field, either by inconsistent legislation or an indication that there be no legislation upon the specific matter. *United States* v. *Holliday*, 70 U. S. 407; *Hanley* v. *Kansas City*, 187 U. S. 617; *Surplus Trading Co.* v. *Cook*, 281 U. S. 647, 651; *United States* v. *McGowan*, 302 U. S. 535, 539. Upon any particular problem arising as to jurisdiction over the New York Indians, the approach best supported by constitutional law and by history is that the State has jurisdiction unless and until Congress has taken it. Cf. *People ex rel. Cusick* v. *Daly*, 212 N. Y. 183, 196-197. That is also the only judicial approach which will avoid anarchy on the reservations.* Upon that view Indian Law § 71 so far as involved herein is constitutional, even without any authorization by Congress.

* See *The Problem of Iroquois Law and Order*, by Hoebel, in "The American Indian" (pub. by Am. Asso. on Ind. Af., 1945) Vol. 2 No. 3 pp. 12-20; also 1924 *Ann. Rep. Bd. of Ind. Comrs.*, pp. 6-7.

(3). However, Indian Law § 71 is authorized by Congress in the 1875 Act.

For many years McKinney's edition of the statutes has carried the Act of Congress in a footnote to Indian Law § 71, upon the view that the federal act of 1875 authorized the State enactment of 1881. The following comparison of statutory language points most directly to that relationship. The federal act says:

> "All municipal laws and regulations of said State may extend over and be in force within said villages: Provided, nevertheless, That nothing in this section shall be construed to authorize the taxation of any Indian, or the property of any Indian not a citizen of the United States."

The State act says:

> "All the general laws of the state are extended over and apply to the same; except that this section shall not authorize the taxation of any Indian or the property of any Indian, not a citizen of the United States."

That the Legislature thought it was acting upon an authorization derived from the Act of Congress, seems clear from that comparison of language. After all these years there should be no conclusion that it erred, unless such conclusion is very strongly supported. It is submitted that the history of the Act of 1875, previously stated, and its various other provisions, do not incline to that conclusion, but on the contrary incline to the conclusion that Congress intended to authorize the State jurisdiction expressed in Indian Law § 71.

(4). The Forness decision does not hold to the contrary.

That the *decision* of the Circuit Court of Appeals in *United States* v. *Forness*, 125 F. 2d 928, did not bear directly upon Indian Law § 71, is apparent from the fact that the

Circuit Court seems to have been unaware of its existence. There is no reference to it in its lengthy opinion. Likewise the opinion ignored such leading decisions relative to the New York Indians as *New York ex rel. Cutler* v. *Dibble*, 21 How. 366, and *United States ex rel. Kennedy* v. *Tyler*, 269 U. S. 13, and did not know of a document so germane to the Salamanca lease matter as the Comptroller General's special report upon it in 1932, *Senate Doc. No. 87, 72nd Cong., 1st Sess.*, Ser. Vol. 9521. Many less relevant materials were cited, but not those. Unserved and unanswered affidavits, stricken out of the record by the District Judge because they never became a part of the trial record, were used as a source for facts which were decisive upon the appeal (125 F. 2d p. 931, note 3, also p. 941), thus deciding against the appellees upon a case of which they never had notice and opportunity to address their arguments.

The Circuit Court opinion interpreted the reference to "municipal laws" in the 1875 Act of Congress, and concluded that it did not authorize Forness to rely upon C. P. A. §§ 997-999 (125 F. 2d p. 932). The State courts, in their opinions herein, accept that conclusion but suggest that the Circuit Court's reasoning ascribes a meaning to "municipal law" which is too narrow, having due regard to the language customarily used in 1875 (R. 27-32, 51-55). Because the argument of that matter is so fully set forth in the State court opinions it is not repeated in this brief.*

For present purposes, it is submitted that in 1875 Congress realized that Salamanca and the other villages were destined to be occupied and governed by white citizens, and

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* See also: *The Cherokee Tobacco*, 11 Wall. 616, 623 (1870, Mr. Justice Bradley, "municipal law"); *The Scotia*, 14 Wall. 170, 183, 184 (1871, Mr. Justice Strong, "municipal regulation"); *Holden* v. *Joy*, 17 Wall. 211 212 (1873, Mr. Justice Clifford, "municipal purposes"); *United States* v. *43 Gallons*, 93 U. S. 188, 192 (1876, argument of Atty. Gen., "municipal regulation").

when it spoke of the extension of the "municipal laws" of the State over the villages it intended the general laws appropriate to regulate such communities, including the State's criminal law. For present purposes, that is all that needs to be decided, and even that may be more than is essential; beneficial as it would be to the City and State to have put at rest the disturbance created by the *Forness* opinion.

(5). Salamanca is not "Indian country" and hence 25 U. S. C. § 217 does not render 18 U. S. C. §§ 451 and 452 applicable.

As previously stated, we assume for present purposes that Congress has power to enact legislation reaching the present case. Undoubtedly Congress has broad powers where Indians are involved even incidentally, and they might be held to extend to those matters.

The petitioner's position is that Salamanca is "Indian country" within the meaning of 25 U. S. C. § 217 (Pet. br. pp. 19-20), hence, 18 U. S. C. § 451 subsec. 3 and § 452 apply (p. 18), and make murder committed in Salamanca a federal offense. Judge Conable said this was "the serious contention" made by the petitioner before his Court (R. 22).

Sections 451 and 452 accomplish nothing in the present case unless Salamanca is "Indian country." The latter section merely defines murder. The former says that crimes and offenses (including murder) "shall be punished as herein prescribed":

> "When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be for the erection of a fort, magazine, arsenal, dockyard, or other needful building."

Salamanca has never been reserved or acquired for the exclusive use of the United States. It is not under its exclusive jurisdiction as a matter of fact; and § 8 of the Act of 1875, providing that certain laws of the State shall "be in force within said villages," shows clearly that the United States disclaims exclusive jurisdiction over Salamanca. See, upon this point, *Surplus Trading Co.* v. *Cook*, 281 U. S. 647, 652; *James* v. *Dravo Contracting Co.*, 302 U. S. 134, 141; *Adams* v. *United States*, 319 U. S. 312. And of course Salamanca has never been acquired by the United States with the consent of the State for a fort, magazine, arsenal, dockyard, or other needful building. Section 451 is obviously irrelevant to the situation now presented, unless some other provision makes it relevant.

We come, then, to 25 U. S. C. § 217, which provides as follows:

> "Except as to crimes the punishment of which is expressly provided for in this title, the general laws of the United States as to the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country."

Our contention is that this provision about "Indian country" has no application to any part of any Indian reservation within the State of New York, and never had. With stronger reason, it has no application to the City of Salamanca.

The provision, like several others now found in Title 25 of the U. S. Code, is from the Indian non-intercourse act of 1834 (4 Stat. 729), which in turn was derived from similar acts of 1802 (II Stat. 139), 1799 (I Stat. 743), 1796 (I Stat. 469), 1793 (I Stat. 329) and 1790 (I Stat. 137).

In the Act of 1834 the provision now involved was § 25, reading as follows:

> "So much of the laws of the United States as provides for the punishment of crimes committed within any place within the sole and exclusive jurisdiction of the United States, shall be in force in the Indian country: Provided, the same shall not extend to crimes committed by one Indian against the person or property of another Indian."

The purpose of the proviso was to leave to Indian justice crimes which involved only Indians and their property, as was held by the Court in 1883 in the case of *Ex parte Crow Dog*, 109 U. S. 556. As a result of that decision there was passed in 1885 the "Seven Major Crimes Act" (23 Stat. 385; 18 U. S. C. § 548), which applied to the specified crimes, not only when committed in the territories, but also when committed by an Indian upon a reservation within a State. The latter branch of the act was sustained, not upon the ground that such reservations are within the ordinary jurisdiction of the United States, but upon the special ground that the Indian tribes are the wards of the nation. See as to this, *United States* v. *Kagama*, 118 U. S. 375, 383, 384, and *Donnelly* v. *United States*, 228 U. S. 243, 270-272. Upon this ground the specified crimes when committed upon a New York reservation are within the jurisdiction of the federal courts since 1885 (*People ex rel. Cusick* v. *Daly*, 212 N. Y. 183), although from 1802 until 1885 the State asserted and maintained sole and exclusive jurisdiction over crimes committed upon the reservations, including the murder of one Indian by another.

The petitioner's brief does not rely upon 18 U. S. C. § 548, probably because that provision for federal jurisdiction relates only to the specific crimes, including murder, when committed *by an Indian within a reservation*, and in the present case neither the petitioner nor his victim was an Indian. However, it has been thought helpful to show that the fact that certain crimes, when committed upon New

York reservations between certain persons, are triable in the federal courts, has no tendency to show that such reservations are "Indian country" within the meaning of 25 U. S. C. § 217, and that *People ex rel. Cusick* v. *Daly*, 212 N. Y. 183, is no authority for granting the present writ.

Coming now to the immediate question, whether Salamanca is "Indian country," it was expressly decided in the negative in 1890 by the Circuit Court, in the case of *Benson* v. *United States*, 44 F. 178. Benson operated a barroom in Salamanca by license from the State, but federal authorities prosecuted him under what is now 25 U. S. C. § 241 (also derived from the Act of 1834, § 20) for introducing intoxicating liquors into the "Indian country." Benson was convicted by the District Court, but that judgment was reversed by the Circuit Court, which said that the "Indian country" did not describe any of the reservations of New York State. The opinion has every appearance of having been carefully considered. No quotation is made from it, because it is not excessively long, and is available to be read in its entirety.

The case of the *New York Indians*, 5 Wall. 761, is cited in petitioner's brief p. 19 for an inference that it assumed the Allegany Reservation was "Indian country." There is no reason to suppose such a question was considered. See the summary of that case in the Appendix to this brief.

There is no "Indian country" east of the Mississippi River, because the definition of such country in the Act of 1834 limited it, as to lands east of the Mississippi, to lands not included within any State. *Bates* v. *Clark*, 95 U. S. 204, 206-208; *Ex parte Crow Dog*, 109 U. S. 556, 560-562.

It is an odd fact that *Bates* v. *Clark* and cases which have followed it as to the meaning of the definition of "Indian country" in the Act of 1834, although they reached the result intended by Congress, made themselves much needless trouble by having overlooked the report of the House committee which reported the bill and explained its meaning. This is *House Report No. 474, 23rd Cong., 1st Sess.*

The Committee on Indian Affairs, to which had been referred President Jackson's message upon Indian affairs, reported three bills, and a report of 131 pages and a map explaining them. Two of the bills were adopted, one for the reorganization of the Department of Indian Affairs (4 Stat. 735), and the Indian non-intercourse act now involved (4 Stat. 729).

At pages 1 and 2 the report had this to say upon the subject now involved:

> "*The Indian country*, to which the bills reported refer, will include all the territory of the United States west of the Mississippi, not within Louisiana, Missouri, and Arkansas, and those portions east of that river, and not within the limits of any State, to which the Indian title is not extinguished. The Southern Indians are not embraced within it. Most of them have agreed to emigrate. To all their lands, with the exception of those of a part of a single tribe, the Indian title has been extinguished; and the States in which the Indians of that excepted tribe remain, have extended their laws over them. In this state of things, the committee, without inquiring whether the States have a right so to do, do not feel disposed, by any act of theirs, to raise up anew that subject of controversy. Their conviction is, that the remaining Indians, at the South, will find it for their best interests to join their brethern at the West. The well informed and intelligent of their nation

must have seen that, involved as they are in the conflict that surrounds them, they cannot remain where they are as a nation: and that their future hopes, and even existence, are best consulted in not including their already allotted lands within the Indian country."

Note that the comma, missing from the bill and from the Act, after the word "State" in the first sentence, was present in the report. This was the same comma which the Court deciding *Bates* v. *Clark* found it necessary to supply. Moreover, the committee made clear that the country of the Cherokees in Georgia and North Carolina, notwithstanding the failure of the United States to extinguish their title to that country, which gave rise to so much trouble, was not to be "Indian country." With stronger reason, then, were the reservations in New York not "Indian country."

Looking at a map of the United States in 1834, it will be seen that Michigan Territory (including what is now the states of Michigan and Wisconsin) was the only land east of the Mississippi not then within a state, and that within its borders were the lands of the Menominee, Winnebago, Ottawa, Miami, Chippewa and other tribes, numbering about 15,000 Indians. Michigan Territory was therefore within the "Indian country" under the Act of 1834, but ceased to be such, either when the Indian title was extinguished, or when it was organized into the states of Michigan and Wisconsin, whichever happened first. New York reservations were not "Indian country" for the purposes of regulation by the Act of 1834, and hence have never been regulated by provisions of U. S. Code, Title 25, applicable to the "Indian country," which includes § 217.

Although a statutory revision of 1878 omitted the definition of "Indian country", it has been held that it is assumed in the provisions still using the phrase, and that its interpretation in *Bates* v. *Clark* still applies. *Ex parte Crow Dog*, 109 U. S. 556, 562; *United States* v. *Le Bris*, 121 U. S. 278, 280; *Clairmont* v. *United States*, 225 U. S. 551, 557-558.

Cases relative to the western states should be noticed, although irrelevant for present purposes. A murder involving non-Indians, committed upon an Indian reservation, if within one of those states admitted without an express exception in favor of the federal jurisdiction, is triable within the state court and not within a federal court. *United States* v. *McBratney*, 104 U. S. 621; *Draper* v. *United States*, 164 U. S. 240. *Pickett* v. *United States*, 216 U. S. 456, cited by petitioner's brief at p. 28, merely illustrates the corollary, that the federal government can and sometimes has expressly reserved such jurisdiction in western states. *Donnelly* v. *United States*, 228 U. S. 243, likewise cited (Pet. br. p. 29), involved a murder of an Indian by a white man on a reservation in California, held to be triable in a federal court.* The suggestion made by petitioner's brief in the same paragraph wherein the last mentioned case is cited, seems to be that broader jurisdiction over Indian reservations is possessed by some western states than by any of the original states, thus attempting to explain the *McBratney* and *Draper* decisions. This

* The Court in the *Donnelly* case distinguished the *McBratney* and *Draper* cases upon the ground that no Indian was involved in those two cases, whereas Donnelly had murdered an Indian (see 228 U. S. at p. 271). It is sufficient for present purposes to note that the facts of the present case place it with the McBratney and Draper cases. Actually our position is that all these western cases are irrelevant, and that we neither take help from the McBratney and Draper cases nor are opposed by any western cases there may be of different tendency.

suggestion is the exact contrary of what has usually been accepted in statement and practice.

Historically, and as a matter of constitutional law, the original states possess full powers of sovereignty except as they surrendered certain specific powers by entering into the Union; and the western states which never were fully independent or confederated sovereignties possess the powers inuring to them upon admission to the Union, which cannot be greater than those retained by the original states and in some instances are restricted. In matters relating to the Indians the powers of the original states are usually supposed to be greater than those of the western states. The quotations from Secretary Lane and Secretary Wilbur, at earlier pages of this brief, illustrate this proposition.

Concluding under this subheading, it is respectfully submitted that the question as to the Acts of Congress cited by the petitioner should be decided to the effect that the City of Salamanca is not "Indian country" as that phrase is used in 25 U. S. C. § 217.

The arguments that New York established criminal jurisdiction over the reservations as early as 1802 and still possesses it except insofar as it has been restricted by 18 U. S. C. § 548, and that "all the general laws" of the State extend over Salamanca by virtue of the Act of 1875 and Indian Law § 71, are alternative and supporting arguments to the same conclusion.

Conclusion.

For the reasons stated, the Supreme Court of the State of New York had jurisdiction of the crime involved, the murder in Salamanca in 1939 of one white person by an-

other white person, and the judgment below should be affirmed.

December 5, 1945.

Respectfully submitted,

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APPENDIX.

Digest of All Decisions by the Supreme Court of the United States and the Circuit Court of Appeals, Second Circuit, relative to the New York Indians, to November 30, 1945.

Supreme Court of the United States

Fellows v. *Blacksmith*, 19 How. 366, 60 U. S. 366 [Tonawandas, 1857] Reported below, same title, 7 N. Y. 401. In 1846 F took possession, under 1838 and 1842 treaties, of a saw-mill on the Tonawanda reservation owned by B, who sued for the trespass. F justified under the treaties. All courts held against him; the State courts because B had not been paid his "improvement money", and the Sup. Ct. on the ground that until U. S. executed the treaties by putting F in possession he could not take it.

New York ex rel. Cutler v. *Dibble*, 21 How. 366, 62 U. S. 366 [Tonawandas, 1859] Reported below, People v. Dibble, 18 Barb. 412, aff'd 16 N. Y. 203; aff'd by Sup. Ct. People v. Soper, 7 N. Y. 429, is a similar case decided on a technical point. See also People ex rel. Blacksmith v. Tracy, 1 Denio 617, 1 How. Pr. 186. Review, by certiorari, of action of Genesee County Judge D in removing intruders C and others from Tonawanda reservation under N. Y. statute of 1821. The statute was held constitutional, and removal of the intruders was upheld by all courts.

The New York Indians; 5 Wall. 761, 72 U. S. 761 [Senecas, 1867] Reverses Fellows v. Deniston, 23 N. Y. 420, which reversed General Term, 3rd Dist. After the Senecas had surrendered all their N. Y. reservations by the treaty of 1838, possession to be given within five years, the State attempted to tax the lands by acts of 1840, 1841, 1842 and 1843, which provided that they should not "affect the right of occupancy of the Indians". After it became apparent by the compromise treaty of 1842 that the Cattaraugus and Allegany reservations would not be vacated, it was provided that no more taxes be imposed against those. In the Court of Appeals it was held, on concession of Comptroller D, that the taxes against the Cattaraugus and

Allegany reservations were void; but it was held that those against the Buffalo Creek reservation, even before the Senecas left it in 1842, had no tendency to disturb their rights and were valid against F and others, the white purchasers. Before the Sup. Ct. the counsel for D argued only for the Buffalo Creek taxes. The Sup. Ct. disregarded the distinction, lumped all together in its opinion, and out of its superior tenderness for Indian rights relieved F and other white land speculators of the taxes imposed against their Buffalo Creek lands. The opinion suggested that such taxes, even with the qualifications imposed to protect the Indians, might be used to embarrass or disturb the tribe; but the basis for the suggestion is not made clear.

Seneca Nation v. *Christy*, 162 U. S. 283, 16 S. Ct. 823 [Senecas, 1896] Affirms 126 N. Y. 127, which affirmed 49 Hun 524. The suit was ejectment brought in the State courts by the Seneca Nation to recover the "Mile Strip" in the Town of Brant, Cattaraugus County. Decision was against them, on the ground that it had been held in Strong v. Waterman, 11 Paige 607, that they could not sue as a tribe except by an enabling act, and in availing themselves of the N. Y. statute of 1845 (see Indian Law § 54) they were subject to the State statute of limitations, which barred their suit. This suit involved directly a treaty of August 31, 1826, made between the Senecas and representatives of the Ogden Land Co., a U. S. Comr. being present apparently as an "umpire", and the Senate having withheld its approval on the ground that it was unnecessary. The briefs asserted that about forty transactions of similar nature entered into between 1796 and 1850 (see Assembly Doc. No. 51 of 1889, pp. 190-381) were drawn in question by this test case. The same broad issue subsequently arose in Deere v. St. Lawrence R. P. Co., 32 F. 2d 550, and U. S. v. Franklin Co., 50 F. Supp. 152.

New York Indians v. *U. S.*, 170 U. S. 1, 18 S. Ct. 531. *U. S.* v. *New York Indians*, 173 U. S. 464, 19 S. Ct. 487 [1898, 1899] Appeals from decisions of U. S. Court of Claims, relative to reparation for Kansas lands. Some

of the findings are of historic interest, but relations of the Indians to the State were not involved.

Onondaga Nation v. *Thatcher*, 189 U. S. 306, 23 S. Ct. 636 [1903] Writ of error from decision at 169 N. Y. 584, which affirmed 53 App. Div. 561, dismissed for lack of a federal question. This case did not decide any question about relations of Indians to State and Federal governments, but involved a lively controversy about some ancient wampum belts, now in the State Museum under authority of L. 1899 c. 153.

People ex rel. Kennedy v. *Becker*, 241 U. S. 556, 36 S. Ct. 705 [Senecas, 1916] Habeas corpus, relative to three Indians arrested for spearing fish in a creek in Erie County outside the reservation, but within lands ceded by treaty of Big Tree, wherein the Senecas retained the right to hunt and fish. Indians were represented by George P. Decker, supported by U. S.; opposed by Atty. Gen. of N. Y. All courts decided against them (165 App. Div. 881; 215 N. Y. 42). It was held that the reservation of fishing rights was not unlimited, but merely to fish subject to the same laws as white persons. "We assume that these Indians are wards of the United States, under the care of an Indian agent; but this fact does not derogate from the authority of the state, in a case like the present, to enforce its laws at the locus in quo."

U. S. ex rel. Kennedy v. *Tyler*, 269 U. S. 13, 46 S. Ct. 1 [Senecas, 1925] Affirms 294 F. 111. K attempted to enforce a Peacemaker's decree, in violation of a writ of prohibition which had been issued by the N. Y. Supreme Court, in support of probate proceedings taken in Erie County Surrogate's Court on the will of a deceased Seneca. K was arrested for contempt, and the present proceeding was habeas corpus brought in the federal courts against the Erie County Sheriff, T, to obtain K's release, on the theory that the proceedings of the State courts were void. In addition to the attorneys for the parties originally interested (Thomas Larkin for the widow and George P. Decker for the Seneca officials) the State Atty. Gen. appeared for T and the U. S. Atty. Gen. supported the Senecas on their appeal. The District Court dismissed the writ on the

ground that the State statutes were controlling. The Sup. Ct. affirmed on the more cautious ground that the questions should first be litigated in the State courts, and not by habeas corpus in the federal courts.

Circuit Court of Appeals, 2nd Circuit

Benson v. *United States*, 44 Fed. 178 (Cir. Ct.) [Senecas, 1890] B operated a barroom in Salamanca by license of the State, but Federal authorities prosecuted him under what is now 25 U. S. C. § 241, for introducing intoxicating liquors into "the Indian country". Salamanca was released to white persons under an Act of Congress of 1875 as amended, and in their possession, but was within the boundaries of the Allegany reservation. B was convicted by the District Court, but that judgment was reversed by the Circuit Court, which said that "Indian country" did not describe any of the reservations of N. Y. State.

United States v. *Boylan*, 265 Fed. 165 [Oneidas, 1920] affirming 256 Fed. 468. About 1843 the Oneida reservation was broken up by arrangement between the Indians and the State. In 1885 one Honyost, an Oneida in possession of one of the allotments of 32 acres, gave a mortgage which later was assigned to Patrick Boylan. In 1905 Boylan's executor foreclosed the mortgage and obtained the property, whereupon one of the heirs commenced a partition action and the property was sold by referee to B. See Boylan v. George, 133 App. Div. 514. The U. S. brought an action of ejectment against B and was successful. The courts laid some emphasis on the fact that the Indian conveyances had not complied with the N. Y. act of 1843, but also said that only the U. S. could break up the reservation, and held that the foreclosure and partition suits were void as to the U. S., and hence not res judicata. Opinion by Manton, Hough concurring, Ward dissenting with opinion on ground tribal organization was terminated. An attempted appeal to Sup. Ct. was taken too late. 257 U. S. 614 mem.

Deere v. *St. Lawrence R. P. Co.*, 32 F. 2d 550 [St. Regis, 1927] D brought suit on behalf of all members

of St. Regis Tribe, to eject the Co. from lands at Massena, which the State acquired in 1824 by treaty with the Tribe. The complaint was dismissed for lack of jurisdiction. There was no diversity of citizenship, the mere fact that D was an Indian did not confer jurisdiction, and the case did not "arise" under the treaties and laws of the U. S., although they were involved. Opinion by Manton, L. Hand and Chase concurring. Reported below, 22 F. 2nd 851.

Ex parte Green, 123 F. 2d 862 [Onondagas, 1941] Regardless of treaty status, Six Nations Indians have been made citizens and liable to draft for military service by Acts of Congress in 1924 and 1940. Cert. den., 316 U. S. 668.

United States v. *Forness*, 125 F. 2d 928 [Senecas, 1942] F was in possession of a business building in Salamanca, said to be worth $60,000, for which he was obligated, by a 99-year lease from the Senecas made in 1892 under the Act of Congress of 1875 as amended, to pay an annual rental of $4. In 1939, he being several years in arrears, the Senecas declared a cancellation. U. S. brought suit to enforce the cancellation, and meanwhile the Senecas offered to continue the lease for a rental of $115 annually. Various defenses available under State laws were held unavailable, on the ground that "State law does not apply to Indians except so far as the United States has given its consent." Judgment of the District Court (37 F. Supp. 337) was reversed and judgment directed for U. S. Opinion by Frank, concurred in by A. N. Hand and Clark. Certiorari was denied by Sup. Ct. (316 U. S. 694) with result that F was compelled to pay the higher rental. Several hundred other suits resulted (Wood v. City of Salamanca, 289 N. Y. 279; Salamanca v. Seneca Nation, 47 F. Supp. 939; United States v. Adamic et al., 49 F. Supp. 221) and in late 1943 or early 1944 many lessees were forced by the U. S. to take new leases. The State refused and its old leases were reinstated by the Senecas upon advice of the Int. Dept.

U. S. ex rel. Ray v. *Martin*, 141 F. 2d 300 [Senecas, 1944] affirming 54 F. Supp. 218 R, a white man, mur-

dered another white man in Salamanca and was convicted in a State court. This proceeding was for habeas corpus based upon the contention that only a federal court had jurisdiction, under 18 U. S. C. §451 subsec. 3, also 25 U. S. C. § 217. The Dist. Ct. held against him on merits and also ground that question should have been first presented to State courts. C. C. A. affirmed in opinion by Judge Frank upon second ground only. Judge Swan concurred, and Judge Clark concurred in separate memorandum on both grounds. Subsequently the State courts decided against R, 181 Misc. 925; aff'd 268 App. Div. 218; aff'd 294 N. Y. 61; cert. granted Oct. 8, 1945.

United States v. *National Gypsum Co. and State*, 141 F. 2d 859 [Tonawandas, 1944] reversing 49 F. Supp. 206. Gypsum leases made in 1921-1922 and 1936 under authority of Indian Law § 85 (L. 1873 c. 394) held constitutional. The entire history of the Tonawanda Reservation, particularly the treaty of 1857 and the deed of 1862 under which it was turned over to the State and the statutes under which it has been regulated, was considered, and the jurisdiction of the State was upheld. See also 42 F. Supp. 752.